IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OLGA KONDRACHUK,

Plaintiff,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,

Defendant.
_____/

No. C 08-5476 CW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Olga Kondrachuk seeks judicial review of Defendant United States Citizenship and Immigration Services' (USCIS) denial of her application for adjustment of status. USCIS moves to dismiss, arguing that the Court lacks subject matter jurisdiction over the action or, in the alternative, that Plaintiff has failed to state a claim. Plaintiff opposes the motion. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court concludes that it lacks subject matter jurisdiction over this action and grants USCIS's motion.

BACKGROUND

I. The K Visa

The K-1 visa is a non-immigrant visa that allows an individual who is engaged to be married to a U.S. citizen to enter the United States for the purpose of concluding the marriage. See 8 U.S.C. § 1101(a)(15)(K)(i). The child of such a fiance(e) who accompanies or follows to join his or her parent may enter the United States with a K-2 visa. See 8 U.S.C. § 1101(a)(15)(K)(iii). A child is defined as an unmarried person under twenty-one years of age. 8 U.S.C. § 1101(b)(1).[1] A K-1 visa holder must conclude his or her marriage with the U.S. citizen within ninety days of being admitted to the United States. 8 U.S.C. § 1184(d)(1).

Prior to the Immigration Marriage Fraud Amendments of 1986 (IMFA), the Immigration and Nationality Act (INA) provided that, after the conclusion of the marriage, "the Attorney General shall record the lawful admission for permanent residence of the alien and minor children." See Pub. L. No. 91-225, 84 Stat. 116, § 3(b) (1970). Since the repeal of the automatic adjustment provision by the IMFA, K visa holders seeking permanent residence have been required to apply for adjustment of status under 8 U.S.C. § 1255(a). See Pub. L. No. 99-639, 100 Stat. 3537, § 3(d) (1986). This section provides that the Secretary of the Department of Homeland Security may adjust an applicant's status to that of lawful permanent resident if the applicant "is eligible to receive

[1]Section 1101(a)(15)(K)(iii) extends K-2 visa eligibility to the "minor child" of a K-1 visa holder. The INA does not define the term "minor child." USCIS interprets the term "minor child" as equivalent to the term "child," which is defined as an unmarried person under twenty-one years of age.

an immigrant visa and is admissible to the United States for permanent residence," and if "an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a). However, a K visa holder's status may only be adjusted to that of conditional permanent resident. 8 U.S.C. § 1255(d). This conditional status was created by the IMFA and is governed by 8 U.S.C. § 1186a. It is designed to prevent an alien's improper use of marriage to a U.S. citizen as a means of obtaining permanent residence. After a period of two years, the condition may be removed if USCIS is persuaded that the marriage is legitimate. 8 U.S.C. § 1186a(c)(3)(B).

Section 1255(a) does not create an independent basis for an applicant to obtain an immigrant visa; it merely establishes a procedure (adjustment of status) by which a visa may be distributed. An alien who is already in the United States but seeks adjustment of status to permanent resident must demonstrate that he or she is entitled to an immigrant visa.[2] After a K-1 visa holder is married to a U.S. citizen, he or she will have no difficulty making such a showing; the marriage renders him or her the "immediate relative" of a citizen, and therefore "eligible to receive an immigrant visa." 8 U.S.C. § 1151(b)(2)(A)(i). "Immediate relatives" comprise children (including stepchildren under the age of eighteen at the time of the marriage), spouses and parents of U.S. citizens. Id. Likewise, an immigrant visa will be "immediately available" to a K-1 visa holder "at the time his

[2]Individuals not present in the United States may obtain an immigrant visa by applying for one with the U.S. Consulate. Once they arrive, they need not adjust their status.

application is filed" because immediate relatives of U.S. citizens, unlike other categories of family-based immigrants, are not subject to annual numeric limitations. 8 U.S.C. §§ 1151(b)(2)(A)(i), (c) and (a).

In contrast, some K-2 visa holders will find themselves without an independent statutory basis for adjusting their status under 8 U.S.C. § 1255(a). Because the IMFA eliminated automatic adjustment of status for K-2 visa holders, they must otherwise be "eligible to receive an immigrant visa" under the INA, and such a visa must be available immediately. K-2 visa holders under the age of eighteen will have no difficulty satisfying these requirements because the INA provides that a U.S. citizen's stepchildren who are less than eighteen years old at the time of the marriage are considered immediate relatives of a citizen and are entitled to an immediate visa on that basis. See 8 U.S.C. § 1101(b)(1)(B). However, K-2 visa holders who are eighteen or older at the time of their K-1 parent's marriage are not considered immediate relatives of a U.S. citizen and are not eligible for an immediate visa. Id. This is true even though these children were given K-2 visas to enter the United States with their K-1 parent when they had already attained eighteen years of age. Nor can these children obtain derivative benefits from their K-1 parent's status as the spouse of a U.S. citizen, because there is no statutory basis for such benefits.[3] See 8 U.S.C. § 1151(b); 8 C.F.R. § 204.2(a)(4).

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[3]After the K-1 visa holder adjusts his or her status to lawful permanent resident, the K-2 child may apply for an immigrant visa as the child of a lawful permanent resident. However, such a visa would not be immediately available because this category of family-

(continued...)

USCIS has acknowledged that the IMFA left this unintended gap in the INA with respect to the adjustment of status of K-2 visa holders. Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Ops. for USCIS, re. Adjustment of Status for K-2 Aliens (Mar. 15, 2007), available at www.uscis.gov/files/pressrelease/K2AdjustStatus031507.pdf (last accessed May 22, 2009). The agency filled the gap by enacting 8 C.F.R. § 214.2(k)(6)(ii), which reads:

> Upon contracting a valid marriage to the petitioner within 90 days of his or her admission as a nonimmigrant pursuant to a valid K-1 visa issued on or after November 10, 1986, the K-1 beneficiary and his or her minor children may apply for adjustment of status to lawful permanent resident under section 245 [8 U.S.C. § 1255] of the Act. Upon approval of the application the director shall record their lawful admission for permanent residence in accordance with that section and subject to the conditions prescribed in section 216 of the Act.

This regulation provides a basis for K-2 visa holders to obtain permanent resident status, even though the INA itself does not expressly provide that K-2 visa holders between the ages of eighteen and twenty-one are eligible for an immigrant visa. As was the case before the IMFA, these benefits flow from the parent's status as the spouse of a U.S. citizen.

The USCIS regulation furthers Congress' intent in creating the K visa to facilitate the entry and subsequent permanent residence of alien fiance(e)s and of their children as well. See Pub. L. No. 91-225. Nothing in the legislative history of the IMFA suggests that Congress intended to eliminate the availability of permanent residence for K-2 visa holders between the ages of eighteen and twenty-one. See H.R. Rep. No. 99-906 (1986). Indeed, such an

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[3](...continued)
based immigrants is subject to annual numeric limits.

interpretation would render the K-2 visa meaningless for these children. Congress could not have intended to authorize the admission of these young people as children of a U.S. citizen's fiance(e), only to send them back to their countries of origin when they soon and inevitably reach the age of twenty-one, because there is no basis for them to obtain an immigrant visa in the meantime. In addition, the only INA provision addressing adjustment of status for K visa holders assumes that K-2 children will be able to adjust their status along with their parents:

> The Attorney General may not adjust, under subsection (a) of this section, the status of a nonimmigrant alien described in section 1101(a)(15)(K) of this title [establishing eligibility for a K-visa] except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101(a)(15)(K) of this title.

8 U.S.C. § 1255(d) (emphasis added).

II. Denial of Plaintiff's Application for Adjustment of Status

According to the complaint, Plaintiff was born on September 20, 1981 and is a citizen of Ukraine. She lived in Ukraine until 2002, when, at the age of twenty, she withdrew from her studies at the Kiev National Trade University and accompanied her mother to the United States. Her mother was admitted on a K-1 visa as the fiancee of a U.S. citizen; Plaintiff was admitted on a K-2 visa as her child. On September 13, 2002, Plaintiff's mother married her fiance within ninety days of her entry, as required by the terms of her visa.

On September 19, 2002, Plaintiff and her mother mailed I-485 applications to USCIS seeking to have their status adjusted to that

of lawful permanent resident. The next day, Plaintiff turned twenty-one. Plaintiff's mother's application for adjustment of status was later approved. However, in a notification dated December 3, 2005, USCIS denied Plaintiff's application. USCIS acknowledged 8 C.F.R. § 214.2(k)(6)(ii), which, as discussed above, is the "gap-filling" regulation that provides the basis for adjusting the status of K-2 visa holders between the ages of eighteen and twenty-one. USCIS nonetheless stated that Plaintiff was ineligible to adjust her status because she was twenty years old when her mother married, and therefore was not eligible for permanent residency as the stepchild of a U.S. citizen.

The USCIS adjudicator's discussion of stepchildren implies the adjudicator believed that, in order to be eligible for permanent residency, a K-2 visa holder must be the stepchild of a U.S. citizen. As discussed above, however, this reasoning would require the conclusion that no K-2 visa holder between the ages of eighteen and twenty-one would ever be eligible for adjustment of status, because individuals who are eighteen years of age or older are excluded from the definition of "stepchild." USCIS itself has recognized that the adjudicators position is inconsistent with the INA and the agency's "gap-filling" regulation. The March 15, 2007 memorandum cited above states:

> The purpose of this memorandum is to remind officers that K-2 aliens seeking to adjust status are NOT required to demonstrate a step-parent/step-child relationship with the petitioner. A K-2 alien who is over 18 years of age may adjust status provided they satisfy the requirements for adjustment of status under Section 245 of the Immigration and Nationality Act (INA). Officers should follow the regulations at 8 CFR 214.2(k)(6)(ii) regarding adjustment of status for K-2 aliens.
>
> The Immigration and Marriage Fraud Amendments of 1986

> created a gap regarding the procedure for a K-2 alien to adjust status to that of a person admitted for permanent residence. The agency has filled the gap with the controlling regulation at 8 CFR 214.2(k)(6)(ii) . . . .
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> . . .
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> Officers should NOT limit the adjustment of status of K-2 aliens to persons under the age of 18 based on the term "minor child" as it appears in 245(d). The INA does not define the term "minor child." Section 101(b)(1) defines the term "child" as "an unmarried person under twenty-one years of age." Consequently, officers should allow for the adjustment of status of K-2 aliens under the age of 21, provided the requirements for adjustment of status in 245 of the INA are satisfied.

3/15/07 Mem. at 1-2 (emphasis in original).

Plaintiff challenges the decision to deny her application under § 706 the Administrative Procedure Act, which permits a court to set aside any agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

LEGAL STANDARD

Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Federal subject matter jurisdiction must exist at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. Stock W., Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989).

Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or

allege an actual lack of jurisdiction that exists despite the formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). "A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits." Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987). Under these circumstances, the allegations in the complaint are not presumed to be true. Id.; see also McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (the district court "may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of [subject matter] jurisdiction").

DISCUSSION

USCIS argues that, under the INA, the Court lacks subject matter jurisdiction to review Plaintiff's challenge to the decision to deny her application for adjustment of status. USCIS relies on 8 U.S.C. § 1252(a)(2)(B), which provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-- (i) any judgment regarding the granting of relief under section . . . 1255 of this title . . . .

8 U.S.C. § 1252(a)(2)(B). As noted above, § 1255 governs adjustment of status. Subparagraph (D) of § 1252(a)(2) provides an exception to the general rule that courts lack jurisdiction to review decisions concerning adjustment of status:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed

> as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D).

In Hassan v. Chertoff, 543 F.3d 564 (9th Cir. 2008), the Ninth Circuit considered a challenge to USCIS's denial of an application for adjustment of status. The court noted that "judicial review of the denial of an adjustment of status application -- a decision governed by 8 U.S.C. § 1255 -- is expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(i)." Id. at 566. The court rejected the plaintiff's argument that it had jurisdiction to review "questions of law" concerning the denial, noting that the plaintiff's challenge was not raised in a petition for review filed with the Ninth Circuit itself -- as required for review under § 1252(a)(2)(D) -- but rather came to the Ninth Circuit on direct appeal from the district court.

Thus, under § 1252 and Hassan, an individual may seek judicial review of the denial of his or her application for adjustment of status only if the challenge involves either "constitutional claims or questions of law" and is raised in a petition for review filed in the court of appeals pursuant to § 1252. Although Plaintiff's challenge raises an issue of law in that she asserts that USCIS improperly determined that she was ineligible for adjustment under the INA, her challenge must be brought in a petition for review before the Ninth Circuit pursuant to § 1252.

Plaintiff asserts that USCIS is precluded from defending this case because its policy of denying the I-485 applications of K-2 visa holders who have reached the age of twenty-one was found to be

contrary to law in the case of Verovkin v. Still, No. C 07-3987 (summary judgment order available at 2007 WL 4557782). In Verovkin, which was also before this Court, the plaintiff challenged USCIS's decision that he was not eligible for adjustment of status because he turned twenty-one between the date on which he submitted his I-485 application and the date on which USCIS adjudicated it. The Court held that the age requirement applied only to the plaintiff's original application for a K-2 visa, and thus he was not required to demonstrate that he was under twenty-one years of age in connection with his application for adjustment of status. The Court entered judgment in the plaintiff's favor, and the defendant did not appeal.

Under Verovkin, Plaintiff was eligible for adjustment of status because she was under the age of twenty-one when she received her K-2 visa. However, even assuming that Plaintiff could invoke collateral estoppel against USCIS to begin with, see United States v. Mendoza, 464 U.S. 154 (1984) (holding that the United States could not be collaterally estopped from arguing that its naturalization policy was constitutional where the policy had been found unconstitutional in an earlier lawsuit brought by a different party), it is axiomatic that the Court cannot adjudicate a claim over which it lacks subject matter jurisdiction. USCIS did not raise the issue of subject matter jurisdiction in Verovkin and, notwithstanding Plaintiff's assertion to the contrary, the Court did not examine the issue in any of its orders. Because collateral estoppel applies only to issues that were actually litigated and decided in a previous action, In re Magnacom Wireless, LLC, 503 F.3d 984, 996 (9th Cir. 2007), the Court may not rely on the

doctrine to conclude that it has subject matter jurisdiction over the present case. To the extent Plaintiff claims that USCIS waived its right to raise lack of subject matter jurisdiction as a defense in the present case because it did not raise the same defense in Verovkin, she has cited no authority in support of her position.

The Court concludes that it lacks subject matter jurisdiction over this action.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss (Docket No. 20) is GRANTED. Plaintiff's motion for an order enjoining USCIS from pursuing removal proceedings against her (Docket No. 23) is DENIED; because the Court lacks subject matter jurisdiction over this case, it has no authority to enjoin the proceedings. Plaintiff may raise the issue of USCIS's erroneous application of the law to her I-485 application in the course of the removal proceedings and, if the proceedings result in a decision that is adverse to her, she may raise the issue in a petition for review with the Ninth Circuit.

The clerk shall enter judgment and close the file. The parties shall bear their own costs.

IT IS SO ORDERED.

Dated: 6/30/09

CLAUDIA WILKEN
United States District Judge